

## Sectarian Books, the Supreme Court and the Establishment Clause

"And pray, my worthy friend," said the minister, with a smile, in which solemnity and sorrow prevailed, "what do you understand, by a *sectarian thing*?"—"A *sectarian thing*," said Mr. Sharp, "why I consider a *sectarian thing* to be—I don't know, that I can exactly explain my meaning, but a *sectarian thing* is, I suppose, a . . ."—"Well, well," said Parson Moody, looking at his watch, "I perceive I have already overstaid an engagement. I will call this afternoon, for the purpose of continuing our conversation."—He took Mr. Sharp affectionately by the hand, and departed; leaving him in perfect astonishment at his own entire ignorance of a term, which he had so frequently and so confidently employed.

—L. Sargent, "A Sectarian Thing," in  
1 *Temperance Tales* 142 (9th ed. 1837).

In *Board of Education v. Allen*,<sup>1</sup> the United States Supreme Court again sought to locate the "serpentine . . . wall of separation between church and state."<sup>2</sup> The issue before the Court was the constitutionality of New York State's Textbook Loan Law,<sup>3</sup> which allows pupils in private and parochial schools to borrow textbooks from public authorities for classroom use.<sup>4</sup> This Note analyzes the attempts of both the Supreme Court and the local school authorities who administer the Law to enforce the prohibitions of the Establishment Clause.<sup>5</sup>

Writing for a majority of six, Mr. Justice White held the law constitutional, adopting the "purpose and primary effect" test enunciated in the Bible reading case, *Abington School District v. Schempp*: "[T]o withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion . . . ."<sup>6</sup> Mr. Justice White made findings favorable to the constitutionality of the statute on both "purpose"

1. 392 U.S. 236 (1968).

2. *Illinois ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203, 238 (1948) (concurring opinion). See also *Torcaso v. Watkins*, 367 U.S. 488, 493 (1961); *McGowan v. Maryland*, 366 U.S. 420, 443 (1961); *Everson v. Bd. of Educ.*, 330 U.S. 1, 15-16 (1947); *Reynolds v. United States*, 98 U.S. 145, 164 (1878).

3. 16 N.Y. CONSOL. LAWS § 701(3) (McKinney 1966).

4. See also LA. REV. STAT. §§ 17:351, 352 (1963); N.M. STAT. ANN. § 77-13-7 (1953); MISS. CODE ANN. tit. 24 § 6656 (1952); R.I. GEN. LAWS ANN. § 16-23-2 (Supp. 1967).

5. "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof . . . ." U.S. CONST. amend. I.

6. 392 U.S. at 243, quoting *Abington School Dist. v. Schempp*, 374 U.S. 203, 222 (1963). Experience prompted an aside that "this test is not easy to apply." 392 U.S. at 243.

and "effect." A secular *purpose* was found in the New York Legislature's expressed intent, "furtherance of the educational opportunities available to the young."<sup>7</sup> In evaluating the law's *effects*, the Court discussed several theories.

First, the Court briefly mentioned the so-called "child-benefit theory," suggesting that because the New York Textbook Law aids children generally, not the religious schools they attend,<sup>8</sup> it does not have the "necessary effect" of advancing religion.<sup>9</sup> But the Court's allusion to the child-benefit theory does not resolve the question of whether the law has a primary effect which advances or inhibits religion.<sup>10</sup> Even if aid may be provided directly to children attending religious schools, the cases do not suggest that this direct aid may be of a sectarian nature.<sup>11</sup>

The Court's second approach to the question of the statute's necessary effects was to deny that religion permeates all that is taught in parochial schools.<sup>12</sup> The Court concluded that no impermissible religious effect exists merely because the loaned books are to be used in parochial schools;<sup>13</sup> a religious school, the Court suggests, provides secular education distinct from its religious instruction.<sup>14</sup>

7. 392 U.S. at 243. The legislature's statement read, in part, that there is "an insufficient proportion of our population educated in the fields of science, mathematics, foreign languages, and other nonsectarian subjects." N.Y. SESSION LAWS ch. 320 § 1 (McKinney 1965).

8. With knowledge of this theory, expounded in the analogous school busing case, *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947), the New York legislature tailored the loan law to bestow its benefits directly upon the children: all book requests are individually signed by the pupils; book orders are placed with the public schools where the pupil resides, not where he attends school; and there is an aid limit calculated on a "per pupil" basis.

9. 392 U.S. at 243.

10. Carried to its logical conclusion, the child benefit theory would permit subsidizing of private school tuition payments, thus providing aid to all aspects of parochial schooling. See L. PFEFFER, CHURCH, STATE AND FREEDOM 560-61 (rev. ed. 1967).

11. Comment, 37 FORDHAM L. REV. 123, 128 (1968). See also La Noue, *The Child Benefit Theory Revisited: Textbooks, Transportation and Medical Care*, 13 J. PUB. LAW 76, 90-91 (1964).

12. But see *Dickman v. School Dist. No. 62C*, 232 Ore. 238, 260, 366 P.2d 533, 544 (1961).

The denominational edition history textbook, *America Yesterday*, which has been approved for purchase under the Textbook Loan Law, instructs its readers that:

Catholics say it is not possible to be neutral in the matter of religion. They say that a boy or girl who spends the day learning history and geography and arithmetic without hearing God's name may gradually begin to think that the things of this world are more important than the things of the next world.

REV. P. FURLONG, SR. MARGARET, D. SHARKEY, *AMERICA YESTERDAY* 273 (rev. ed. 1963).

13. The child benefit theory avoids the permeation argument by focusing on the child, not the school, as the recipient of state aid. Valente, *Aid to Church Related Education--New Directions Without Dogma*, 55 VA. L. REV. 579, 590 (1969).

14. For this proposition Mr. Justice White cited *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), which held that Oregon could not compel universal public schooling because the state's interest in secular education is adequately satisfied by parochial education. Additional support is said to be found in the corollary acceptance by the states of parochial school attendance in satisfaction of the compulsory school attendance laws. 392 U.S. at 245-48. This use of *Pierce* and the attendance laws to find that religion does not permeate secular education in parochial schools is fallacious. To say, as *Pierce* does, that a type of instruction satisfies the state interest, is not to say that this type of instruc-

Third, the Court interpreted the Law as making only secular textbooks available for loan. The statute would have no impermissible effects because religious or sectarian textbooks were not to be loaned.<sup>15</sup> Justice White wrote:

Although the books loaned are those required by the parochial school for use in specific courses, each book loaned must be approved by the public school authorities; only secular books may receive approval. The law was construed by the Court of Appeals of New York as "merely making available secular textbooks at the request of the individual student," . . . and the record contains no suggestion that religious books have been loaned. Absent evidence we cannot assume that school authorities, who constantly face the same problem in selecting textbooks for use in the public schools, are unable to distinguish between secular and religious books or that they will not honestly discharge their duties under the law.<sup>16</sup>

From this third finding on "effects," the majority concludes that on the face of the law no establishment of religion occurs since the statute provides for the screening of requested books by public officials to prevent the supplying of religious books. Is such review provided for? Do the reviewers have adequate standards to conduct effective review? How has the act been administered? This study,<sup>17</sup> carried on

tion could be constitutionally provided or supported by the state. *Pierce* requires only that a certain amount of secular information be imparted to the pupil, whether or not this information is intertwined with religion. It cannot be concluded from *Pierce* that religious and secular instruction are separate or separable in parochial schools.

15. *But see* Brief for Appellants at 36, *Board of Educ. v. Allen*, 392 U.S. 236 (1968).

16. 392 U.S. at 245.

17. The study was aided by funds supplied by the Ford Foundation through Yale Law School. Information was gathered chiefly through questionnaires and interviews. A questionnaire concerning school board enrollment procedures, definitions of "sectarian," and interpretations of the Loan Law was sent to 101 of the 240 New York School Boards. This number included all 62 districts listed by the state as "cities," and 39 of the 178 districts listed by the state as "villages," randomly chosen. Questions on defining "sectarian" were to be answered only by persons involved in reviewing textbooks requested under the law. Because of incompleteness and replies by improper officials only about 45 districts could be used for most tallies. *See* Tabulated Results in APPENDIX, pp. 139-41 *infra*.

To compensate for the inadequacies of the questionnaire technique, efforts were made to supplement and verify questionnaire replies through personal and telephone interviews. Additional sources, such as publishers and parochial school officials, were contacted through correspondence and interviews.

Rochester was used as an in-depth case study. All persons involved with the Textbook Loan Law in Rochester were personally interviewed, and individually replied to the questionnaire. The Law Journal expresses its appreciation for the help and cooperation of Dr. George J. Rentsch, Acting Assistant Superintendent, and his department.

The school boards were asked to supply book lists with their questionnaire replies. Approximately 30 lists were received. From these, titles were chosen in the areas of literature and social studies for a spot check on sectarian purchases.

Almost universally, the officials with whom we dealt were cooperative. Their help was indispensable. The Board of Editors of Volume 79 of the Yale Law Journal wishes to acknowledge the assistance and encouragement given this Note by B.E. Carter and R.E. Ayres, *Projects Editors* of Volume 78.

during the 1968-69 academic year, attempts to answer these questions concerning the effects of the Law.

### I. Textbook Review Standards

In quoting with approval the interpretation given the Textbook Loan Law<sup>18</sup> by the New York State Court of Appeals,<sup>19</sup> the Supreme Court reads the Act as "merely making available secular textbooks"<sup>20</sup> and not authorizing the loan of sectarian or religious books.<sup>21</sup> Thus, approval or disapproval of a loan by public school authorities depends on whether the content of the requested book is of a secular or religious character.

This method of review—reliance upon the content of the book—cannot directly accomplish the goals of the first amendment. Since the concern of the Establishment Clause is the government's propagation of religion, the effect of a government-purchased textbook *as it is used* should be the question facing reviewers.<sup>22</sup> A seemingly neutral discussion within a book could be presented in the classroom in a way such that the book becomes a tool to promote religion or the views of a sect. In stating that the "meager record" before the Court did not justify a conclusion that "the processes of secular and religious training are so intertwined that secular textbooks furnished to students by the

18. In the several cities and school districts of the state, boards of education . . . shall have the power and duty to purchase and to loan upon individual request, to all children residing in such district who are enrolled in grades seven to twelve of a public or private school which complies with the compulsory education law, textbooks. Text-books loaned to children enrolled in grades seven to twelve of said private schools shall be text-books which are designated for use in any public, elementary or secondary schools of the state or are approved by any boards of education, trustees or other school authorities. Such text-books are to be loaned free to such children subject to such rules and regulations as are or may be prescribed by the Board of Regents . . .

16 N.Y. CONSOL. LAWS § 701(3) (McKinney 1966).

In the regulations and provisions under the New York Textbook Loan Law "secular" and "non-sectarian" are intended to be used synonymously. Reply made in oral argument in *Allen* by Mrs. Jean Coon, New York State Assistant Attorney General, in response to a question by Justice Fortas, quoted in *Rochester Times-Union*, April 24, 1968, at 1.

For this study, in the text and questionnaires, the words "secular" and "non-sectarian" are used interchangeably; in relation to textbooks either word describes a book which neither promotes one religion over another religion nor religion over non-religion.

19. *Board of Educ. v. Allen*, 20 N.Y.2d 109, 228 N.E.2d 791, 281 N.Y.S.2d 799 (1967).

20. *Board of Educ. v. Allen*, 392 U.S. 236, 241 (1963).

21. Letter from Herbert F. Johnson, Associate Commissioner, New York State Education Dept., to City, Village, and District Superintendents, Jan. 10, 1966, on file at the Yale Law Journal: "This places a responsibility on each board to make a determination that any textbooks which it provides are of a non-sectarian nature."

22. The Supreme Court adopted the "use" test by implication in *Abington School Dist. v. Schempp*, 374 U.S. 203, 224 (1963), where Justice Clark, in striking down school Bible reading, found that the facts were not "consistent with the contention that the Bible is here used either as an instrument for nonreligious moral inspiration or as a reference for the teaching of secular subjects."

public are in fact instrumental in the teaching of religion,"<sup>23</sup> Justice White does imply that the loan of a book which is non-sectarian within its covers but which is nevertheless put to a religious use would violate the Establishment Clause. Nevertheless, the Court in *Allen*, by not requiring screeners to inquire into the use to which a book proposed for loan will be put, apparently accepts the presumption that a book which is secular within its covers will be put to a secular use, and that a religious book will not be used within a parochial school in a manner that will "cure" it of an impermissible effect.<sup>24</sup> Guidelines issued by the New York State Commissioner of Education under the Textbook Loan Law entirely abandon a "use" approach, requiring that review depend entirely on the content of the book;<sup>25</sup> they thus prohibit extending the scope of review even when there is evidence of a religious use.

Whether one talks of religious and secular *books* or religious and secular *uses*, the assumption that workable distinctions between "secular" and "religious" can be made is highly questionable. The Supreme Court gave assurances that the secular/religious distinction was a workable one: "Absent evidence, we cannot assume that school authorities, who constantly face the same problem in selecting textbooks for use in the public schools, are unable to distinguish between secular and religious books . . ."<sup>26</sup> The Court, however, as emphasized by the dissenters,<sup>27</sup> declined to discuss the standards which textbook reviewers must apply. Thus, the defining of a standard which describes permissible state aid, as well as the application of that standard, was delegated to the supposedly expert local school authorities.

No federal court has been squarely confronted with the problem of deciding whether a particular book is sectarian.<sup>28</sup> The question has,

23. Board of Educ. v. Allen, 392 U.S. 236, 248 (1968).

24. Investigation into the use of the textbook itself would raise serious questions under the Free Exercise Clause by initiating state investigation and supervision of private school syllabuses and lesson plans. See Note, 57 ILL. B.J. 246, 250 (1968); Comment, *Public Control of Private Sectarian Institutions Receiving Public Funds*, 63 MICH. L. REV. 142, 154 (1964).

25. Guidelines for Administering the New York State Textbook Law, N.Y. State Education Dept., 1, June 28, 1967.

26. Board of Educ. v. Allen, 392 U.S. 236, 245 (1968).

27. Quoting the statement of Judge Van Voorhis, a dissenter in the New York Court of Appeals, Justice Douglas, dissenting in *Allen*, said, "'there is no reliable standard by which secular and religious books can be distinguished from each other.'" *Id.* at 257-58. Justice Douglas then quoted excerpts from textbooks to demonstrate their susceptibility to religiously slanted treatment. He speculated that, in the absence of any court-defined standards, and given the possibilities for political pressure inherent in a system of local board allocation of funds, sectarian books would be supplied under the New York law. *Id.* at 264-66. Cf. N.Y. Times, Jan. 26, 1969, at 1 ("Archdiocese Bids Catholics Seek Local School Offices").

28. In cases arising mostly from federal bigamy, tax, selective service, and social security laws, the federal courts have used tortured analyses in applying related terms. "Religion":

however, been the central issue of numerous state court cases testing the validity of public school Bible reading.<sup>29</sup> The review criteria suggested by these state cases are based on the following questions:

1. What is a religion for the purposes of first amendment book review?<sup>30</sup>

Davis v. Beason, 133 U.S. 333, 342 (1890); Reynolds v. United States, 98 U.S. 145, 162 (1878); School Dist. v. Gobitis, 108 F.2d 683, 685 (3d Cir. 1939). "*Religious purposes*": O'Leary v. Social Sec. Bd., 153 F.2d 704, 705 (3d Cir. 1946); Girard Trust Co. v. Comm'r, 122 F.2d 108, 110 (3d Cir. 1941); Gund's Estate v. Comm'r, 113 F.2d 61, 62 (6th Cir. 1940); Salvation Army v. United States, 138 F. Supp. 914, 917-18 (S.D.N.Y. 1956); Potter v. United States, 79 F. Supp. 297, 299 (N.D. Ill. 1946); Lord's Day Alliance of Pa. v. United States, 65 F. Supp. 62, 66 (E.D. Pa. 1946). "*Religious impulse*": United States v. Kauten, 133 F.2d 703, 708 (2d Cir. 1943). "*Religious corporation*": Washington Ethical Society v. District of Columbia, 249 F.2d 127, 129 (D.C. Cir. 1957). "*Religious activity*": Engel v. Vitale, 370 U.S. 421 (1962); DeSpain v. DeKalb County Community School Dist., 255 F. Supp. 655, 656 (N.D. Ill. 1966). "*Religious training and belief*": United States v. Seeger, 380 U.S. 163, 173-85 (1965); Berman v. United States, 156 F.2d 377, 380 (9th Cir. 1946). "*Religious venture*": Murdock v. Pennsylvania, 319 U.S. 105, 110-12 (1943).

29. Cases holding the Bible (usually King James Version) nonsectarian: People *ex rel.* Vollmar v. Stanley, 81 Colo. 276, 255 P. 610 (1927); Wilkerson v. City of Rome, 152 Ga. 762, 110 S.E. 895 (1922); Hackett v. Brooksville Graded School Dist., 120 Ky. 608, 87 S.W. 792 (1905); Doremus v. Board of Educ., 5 N.J. 435, 75 A.2d 880 (1950) (Old Testament only); Church v. Bullock, 104 Tex. 1, 109 S.W. 115 (1908).

Cases holding the Bible nonsectarian if used as a textbook or library reference book: Evans v. Selma Union High School Dist., 193 Cal. 54, 222 P. 801 (1924); Donahoe v. Richards, 38 Me. 379 (1854); Pfeiffer v. Board of Educ., 118 Mich. 560, 77 N.W. 250 (1898).

Cases holding the Bible sectarian: People *ex rel.* Ring v. Board of Educ., 245 Ill. 334, 92 N.E. 251 (1910); Herold v. Parish Bd. of School Directors, 136 La. 1034, 68 So. 116 (1915); Tudor v. Board of Educ., 14 N.J. 31, 100 A.2d 857 (1953); State *ex rel.* Dearle v. Frazier, 102 Wash. 369, 173 P. 35 (1918).

The large number of state cases is explained by the frequently explicit prohibitions in state constitutions against "sectarian" acts and aid. See, e.g., ARIZ. CONST. art. 11, § 7; MONT. CONST. art. XI, § 9; NEV. CONST. art. 11, § 2; N.M. CONST. art. XXI, § 4; OKLA. CONST. art. I, § 5; UTAH CONST. art. III, § 4; WIS. CONST. art. 10, § 3; WYO. CONST. art. 7, § 12.

Before the application of the First Amendment to the states through the Fourteenth Amendment, Bible reading cases remained in the state courts.

30. A Pennsylvania case limited the word "religion" to Christianity and held: "The Bible is not a sectarian book. On its broad foundation Christianity rests. Without it there is no Christianity. This proposition is recognized by every division of Christendom throughout the whole world. It is not the book of any sect." *Stevenson v. Hanyon*, 7 Pa. Dist. 585, 590 (1898).

By expanding the scope of "religion" to include the three major American religions, the New Jersey Supreme Court came to a different result: "We consider that the Old Testament, because of its antiquity, its content, and its wide acceptance, is not a sectarian book . . ." *Doremus v. Board of Educ.*, 5 N.J. 435, 448, 75 A.2d 880, 886 (1950), *appeal dismissed*, 342 U.S. 429 (1952). But the New Testament, anathema to Jews, is, to the New Jersey Court, "sectarian." *Tudor v. Board of Educ.*, 14 N.J. 31, 48, 100 A.2d 857, 866 (1953).

By defining "religion" to encompass different creeds, variations within a creed, and atheists, the sectarian label is more widely applicable. For instance:

To the Jewish faith, the entire New Testament is blasphemous for attributing divinity to a human being. Similarly, to label the King James Version as non-sectarian is an affront to Catholics. Hence, the reading or distribution of this Bible in public school classrooms would necessarily be prejudicial to those who do not accept the King James Version or any version at all.

Note, *The First Amendment and Distribution of Religious Literature in the Public Schools*, 41 VA. L. REV. 789, 798 (1955). See *Abington School Dist. v. Schempp*, 374 U.S. 203 (1963).

2. Does the book, overtly or covertly, present religious tenets which are not universally held?<sup>31</sup>
3. Does the presentation of these tenets within the book take the form of advocacy?<sup>32</sup>

These three questions provide a framework for analyzing textbook review for purposes of the Establishment Clause.

#### A. *Defining Religion or Sect*

It is clear that any book favoring the views of one sect over another should be rejected. The Establishment Clause requires government neutrality toward religion; it forbids government propagation of religion over non-religion or of one religion over another.<sup>33</sup> The most difficult theoretical problems in attempting to define "where the secular ends and the sectarian begins"<sup>34</sup> in textbook review arise in answering the preliminary question of what is a religion or religious sect.<sup>35</sup> Would a text advocating the tenets of the League of Spiritual Discovery be classified as a secular or sectarian book? What is the difference between a religion and an ideology? Would a book placing capitalism or democracy or individualism at the center of a world view run afoul of the Establishment Clause? Would a textbook advocating black separatism as a tenet of the Black Muslim religion be treated

31. Even in as obvious a case of nonuniversally held religious tenets as the Bible, this question is susceptible to different answers: "[R]ejoice that in [the Bible's] revelations and its teachings, there is so much which mounts above controversy and stands as universal acknowledgement." From speech by Daniel Webster in oral argument of *Pidal v. Girard's Executor*, 43 U.S. 1 (2 How.) 126 (1844) (*Girard Will Case*), quoted in Davis, *The Bible as a Text Book*, 2 UNIV. Q. 94-96 (1860).

32. In finding Bible reading permissible one state court seemed to find no advocacy in the Biblical content: "The history of a religion, including its teachings and claim of authority—as, for example, the writings of Confucius or Mohamet—might be profitably studied. Why may not also the wisdom of Solomon and the Life of Christ?" *Hackett v. Brooksville Graded School Dist.*, 120 Ky. 608, 87 S.W. 792, 794 (1905).

Some Bible cases ask whether the book is used so as to nullify the effect of advocacy. Despite acknowledgment that the Bible is a religious book, one court approved its use in the public schools if used for information and reading exercises rather than indoctrination. *Pfeiffer v. Board of Educ.*, 118 Mich. 560, 568, 77 N.W. 250, 253 (1893). Another explicitly rejected the argument that a secular use of the Bible is possible: "[The Bible] is not adapted for use as a textbook for teaching alone of reading, of history, or of literature, without regard to its religious character. Such use would be inconsistent with its true character and the reverence in which the Scriptures are held and should be held." *People ex rel. Ring v. Board of Educ.*, 245 Ill. 334, 348, 92 N.E. 251, 255 (1910).

33. *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947). See, e.g., *Epperson v. Arkansas*, 393 U.S. 97, 102 (1968); *Abington School Dist. v. Schempp*, 374 U.S. 203, 216-17 (1963); *Torcaso v. Watkins*, 367 U.S. 488, 492-93 (1961); *McGowan v. Maryland*, 366 U.S. 420, 443 (1961); *Illinois ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203, 210-12 (1948).

34. *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203, 237-38 (1948) (Jackson, J., concurring).

35. See LOCKHART, KAMISAR, & CHOPER, *CASES AND MATERIALS ON CONSTITUTIONAL RIGHTS AND LIBERTIES* 785 (2d ed. 1967).

differently from a textbook advocating black separatism as the political philosophy of a black nationalist group? Is morality ever separable from religion? If a moral view is historically rooted in a religion, can its advocacy within a textbook ever escape the charge of being religious? Whose definition of religion should be controlling?

With "secular" and "religious" defining, respectively, the areas of permissible and impermissible state involvement, application of settled first amendment principles—requiring that the state neither favor nor disfavor any religion or sect—would result in the rejection of almost all textbooks as religious books. Given the large number of diverse religious sects, virtually no text is neutral toward the doctrines of all sects.<sup>36</sup> Furthermore, even the text which succeeds in expunging all religious and anti-religious references can be said to be tainted by a tone of anti-religious secularism.<sup>37</sup>

The Court clearly did not regard the review process as necessarily excluding nearly every book from the approved list, but it failed even to suggest any less severe standard. In practice, most reviewers have been concerned only about favoritism between Catholics and Protestants or among Catholics, Protestants and Jews.<sup>38</sup> The reviewers show

36. Cf. *Epperson v. Arkansas*, 393 U.S. 97, 113 (1968) (Black, J., concurring):

The Darwinian theory is said to challenge the Bible's story of creation; so too have some of those who believe in the Bible, along with many others, challenged the Darwinian theory. Since there is no indication that the literal Biblical doctrine of the origin of man is included in the curriculum of Arkansas schools, does not the removal of the subject of evolution leave the State in a neutral position toward these supposedly competing religious and anti-religious doctrines? Unless this Court is prepared simply to write off as pure nonsense the views of those who consider evolution an anti-religious doctrine, then this issue presents problems under the Establishment Clause far more troublesome than are discussed in the Court's opinion.

37. Canavan, *Implications of the School Prayer and Bible Reading Decisions: The Welfare State*, 13 J. PUB. LAW 439, 440 (1964). The charge of impermissible secularism could apply to all of public education. The requirement of government neutrality toward religion might be interpreted to require that for any issue on which some religion takes a position, a public school may not present another position as unqualifiedly true. Such an approach, which would bar much indoctrination which now takes place in the schools, could help students develop their capacities for critical thinking. However, even this enthroneing of "critical thinking" might be seen as forbidden indoctrination.

38. This conclusion is drawn from the questionnaire data. In response to the question, "Does a picture of a cross on the spine or cover or frontispiece of a textbook render it sectarian?" 45% (20) replied that the textbook would be sectarian; 41% (18) replied that it would contribute to a finding of sectarian; and 14% (6) replied that this characteristic would be irrelevant to a finding of sectarianism.

In response to a question substituting "saint" for "cross," the percentages were almost identical due to identical answers by 75% of the respondents, changes by the other 25%: "Yes": 43% (19), "Partly": 43% (19); and "No": 14% (6).

For the consistent 75% of the 86% who think both characteristics, the cross and the saint, contribute wholly or partly to a finding of sectarian, it can be concluded that the community of sects is defined to include not only Protestants, who do not generally recognize the saints, but Jews who do not recognize the cross.

Where the presence of saints is said to be sectarian, but not the presence of the cross (the replies of Horseheads and Dunkirk, N.Y.), it is possibly due to the exclusion of the Jewish faith from the community of sects. But these and other shifts on these two questions might be due to other considerations.



little or no concern about propagation of views shared by these three religions but not by other sects or by non-believers.<sup>39</sup> Thus, the reviewers are using a test that is workable, in the sense that books are being supplied, but one that fails to meet articulated requirements of the Establishment Clause. Furthermore, our study indicates that the review process has failed effectively to apply to the textbooks submitted for approval even the standard of favoritism among Catholics, Protestants and Jews.<sup>40</sup>

*B. Identifying Non-Universal Tenets*

*Religious References.* Identifying overt references to religious doctrines, events, or objects which are not universally shared requires knowledge of the subject matter of the textbook and a thorough knowledge of religious doctrines. This expertise is usually not to be found in the New York officials charged with textbook review. In the 180 school districts classified by the State as "villages," review for all subjects is often the task of a single person.<sup>41</sup> The simultaneous duties of these officials range from Superintendent<sup>42</sup> to Assistant Business Manager.<sup>43</sup> There is no reason to assume that the identification of even overt sectarian references is being competently done when it is entrusted by this Law to officials without needed qualifications and with extensive other duties.<sup>44</sup>

*Moral Undertone.* Religious beliefs can also be advanced in a text-

39. In response to the question, "Does a discussion of evolution as related to the Book of Genesis render a biology textbook sectarian?" 54% (22) of the replies indicated that such content would be irrelevant to a finding of sectarianism. In light of the obvious refusal by atheists to recognize the Book of Genesis, to say nothing of its rejection by other religions, at least 55% of the respondents exclude atheists from their communities of sects. Among the remaining 46%, many might have found this sectarian for other reasons than its offensiveness to atheists, thus giving no indication that atheists are necessarily included in their communities of sects.

The responses of the majority correlate with those given in interviews with the Rochester Area Consultant reviewers. They interpret the task of eliminating sectarian books as one of preventing purchase of a book that would be "offensive" to some sect, not as one of preventing the government's participation in the propagation of a faith. The concern of the reviewers, then, is often with the political presence and salience of a potentially offended sect within the community. Limitation of the relevant community of sects generally to the three major religions and, in some districts, to Christians, follows the political realities of the districts.

The exclusion of atheists also conforms to the empirical findings of "a deeply held American view against teaching doctrine which conflicts with conventional religion," cited in *Kalven, A Commemorative Case Note: Scopes v. State*, 27 U. CHI. L. REV. 505, 509 (1960).

40. See "Questionnaire Hypotheticals," pp. 139-41 *infra*.

41. Seventy per cent (23) of responding school boards indicated that books are routinely reviewed by only one reviewer.

42. Reply to Plattsburgh, N.Y., questionnaire.

43. Reply to Norwich, N.Y., questionnaire.

44. See "Questionnaire Hypotheticals," pp. 139-41 *infra*.

book by a sectarian moral or ethical undertone.<sup>45</sup> Simply to spot an overt reference is a simple task; the problem comes only in determining whether the reference advances or inhibits religion. But identifying undertones presents a double difficulty: even to spot an undertone is a demanding task. Given the constraints on the New York reviewers—limited time and lack of special knowledge—it is impossible for their inspections of contents consistently to expose the impermissible undertones which may be present. More effective review, in the face of this difficulty, could be accomplished by the use of indirect indicia of underlying religious content, such as a textbook's church authorship, publisher, or endorsement.

Certainly a cleric is capable of authoring a non-sectarian textbook.<sup>46</sup> However, religious authorship does tend to indicate a sectarian content: there is a likelihood of at least subconscious bias, and a possibility that the fact of clerical authorship indicates that the book was written and published in the hope of having a particular appeal to parochial schools.<sup>47</sup> But the regulations under the Textbook Loan Law declare that the reviewers' decisions must depend "entirely on content"; authorship cannot be considered.<sup>48</sup> School boards follow this dictate—eighty-seven per cent (41) of the responding school boards replied that clerical authorship is not considered in determining whether a book is sectarian.

The regulations are thus handicapping the reviewers by simultaneously requiring that the decisions be based only on content, and forbidding the use of a valid indicator of hidden elements of content. A system in which reviewers would be permitted to look to authorship as an indirect indicator of content would more consistently detect impermissible textbooks.

In a different sense, clerical authorship might cause the reader to

45. Some subjects are more susceptible than others to underlying sectarian orientation. Reading and history texts can easily be manipulated to support a moral.

46. *Contra*, H. L. MENCKEN, *TREATISE ON THE GODS* 258 (rev. ed. 1946):

No one ever heard of a pious savant contributing anything of solid value to history, economics, or political theory, and even in the domain of biology, the chief exercise ground of modern science, what little has been done has been offered timidly, and with saving protestations of orthodoxy.

47. The President of Laidlaw Brothers Publishing states that a textbook is sectarian if it "was designed specifically to be used in Catholic Schools." Letter from Robert R. Laidlaw to the Yale Law Journal, February 19, 1969.

48. "Authorship by a person identified with a religious organization does not by itself make the textbook sectarian. The final determination in such case depends entirely on the content." N.Y. State Education Dept., *Guidelines for Administering the New York State Textbook Law*, 1, June 28, 1967. An ambiguity is created in the first sentence of this rule, by referring to authorship "by itself." This ambiguity is resolved by the clear second sentence limiting reviewers' consideration to content.

perceive secular contents as sectarian. An author's religious credentials could suggest to the reader that the text contains the word of the church. If the reader attributes to the church and its doctrines the attractiveness of an otherwise secular book, the stature and apparent truthfulness of other church statements may be enhanced.<sup>49</sup>

In addition, the religious character of the author's name could itself be an element of sectarian content. New York reviewers attach strong significance to religious emblems or symbols in textbooks.<sup>50</sup> On questionnaire replies, eighty-six per cent (38) of reviewers said that cover pictures of a cross or saints contribute to or are in themselves adequate for a finding of sectarian content. That the regulations permit use of these emblems as evidence of sectarian content, but prohibit the use of religious authorship insignia, is further evidence of the confusion and irrationality built into the review criteria.

Church endorsement is another "exterior" characteristic which is treated irrationally. The regulations impose the opposite rule from that on religious authorship. The "imprimatur" and "nihil obstat" are symbols of Catholic Church approval which appear on the back of the frontispiece of the approved textbook. This endorsement, acquired after voluntary submission of the book to the church by the publisher,<sup>51</sup> attests that the book is not offensive to the church, and is recommended for use in parochial schools.

As with clerical authorship, these notations should be seen as indirect indicia of sectarian content.<sup>52</sup> The publisher's gaining of the "imprimatur" indicates his interest in appealing to Catholic readers.<sup>53</sup>

49. On the other hand, clear indication of Church involvement could operate as a caveat to outsiders, thereby reducing the proselytic effect of the textbook. Interview with Dr. Nellie Love, Educ. Communications Area Consultant, Rochester Public Schools, in Rochester, N.Y., February 12, 1969. [Hereinafter, citations to Rochester Area Consultant interviews of February 12, 1969, include only name and title of interviewee.]

50. In an analogous situation, state courts divide on whether the religious effect of nuns in clerical habits teaching secular subjects in the public schools is significant enough to taint an otherwise secular lesson and constitute an establishment of religion. *Gerhardt v. Heid*, 66 N.D. 444, 267 N.W. 127 (1936) (religious dress permitted); *O'Connor v. Hendrick*, 184 N.Y. 421, 77 N.E. 612 (1906) (prohibiting religious garb in accord with state constitutional policy).

51. Telephone interview with Miss Mary Georgio, Catholic Sales Department, Harcourt, Brace & World, November 20, 1968; Telephone interview with Mr. Roland J. Heubner, Director of Specially Funded Programs—Supply, New York City Public Schools, November 26, 1968.

52. In explanation of the "Partly" (26%) and "No" (11%) responses to the hypothetical question, it is interesting to note that in interviews with Rochester Area Consultants in Music, Art, Industrial Arts, and Commerce, some reviewers revealed a complete lack of knowledge that "imprimaturs" exist, much less what they signify.

53. Catholic schools, of course, favor Church-approved textbooks. Telephone interview with Mr. Sam Musso, Coordinator of Title Grants, Rochester Catholic Schools, February 14, 1969. New York State officials labor under the erroneous belief that "there would be no reason for placing such notations on such books if they were not doctrinal in content."

This intention could have pervaded the writing of the book or could reveal the publisher's evaluation of the contents once written. However, unlike clerical authorship and cover pictures, the "imprimatur" and "nihil obstat" are not themselves elements of sectarian content: obscurely located and probably not understood by most readers, the endorsement notations cannot significantly affect the readers' response to the content.

The interpretation of the Textbook Loan Law by the New York State Education Department, through an Advisory Opinion of Counsel,<sup>54</sup> is that the requirement that books be non-sectarian "eliminates denominational editions and those carrying the 'imprimatur' or 'nihil obstat' of a religious authority."<sup>55</sup> Following this interpretation, sixty-three per cent (29) of the school boards replied that the presence of an "imprimatur" would cause a history textbook to be rejected, and the same number replied that the presence of an "imprimatur" would cause a mechanical drawing textbook to be rejected.

The treatment of the "imprimatur" by the regulations further illustrates the irrationality of review under the Textbook Loan Law. Rigidly applying the State Education Department's total ban on textbooks with imprimaturs and nihil obstats, all school boards which stated they would reject a history textbook because of its endorsement would also reject a mechanical drawing textbook with the endorsement. The strength of the presumption of sectarianism raised by the existence of an imprimatur is certainly greater in the case of history than mechanical drawing, because history books are more susceptible to sectarian slanting.<sup>56</sup>

Thus, as evidenced by the treatment of both clerical authorship and imprimaturs, the absence of any workable standard applicable to con-

Letter from Mr. Robert D. Stone, Counsel, New York State Education Dept., to the Yale Law Journal, February 20, 1969.

In recent years, partly because the New York Textbook Loan Law has removed a large direct parochial school market, the printing of texts with ecclesiastical notations has dropped markedly. Telephone interview with Mr. Peter Martin, Administrative Assistant for Textbook Selection, New York State Department of Education, November 25, 1968; Telephone interview with Mr. Sam Musso, note 30 *supra*.

54. Opinion of Counsel No. 181, July 8, 1966.

55. *Id.* at 2. See Board of Education v. Allen, 392 U.S. 236, 255-56 n.5 (Douglas, J., dissenting). Also adopted in Memorandum from Mr. Joseph F. Fox, Rockville Centre Diocesan Coordinator, Government Education Programs, to Catholic Elementary and Secondary School Principals, p. 5, February 23, 1967.

56. An additional sign of reviewers' misguided adherence to Opinion of Counsel No. 181 is the sharp drop in "Yes" responses when asked whether the notation "With Ecclesiastical Approval" would render a textbook sectarian. Only 33% (15) answered "Yes," compared with 63% for the "imprimatur" or "nihil obstat," even though "With Ecclesiastical Approval," used in Scott-Foresman's "Cathedral" Catholic edition, is only an informal euphemism for the "imprimatur."

tent drives the authorities to adopt absolute rules. And the absolute rules adopted do not rationally discriminate among textbooks on any standard of sectarianism.<sup>57</sup>

C. *Advocacy*

In describing what makes a book sectarian, screeners indicate the importance of the advocacy of religious tenets:

"Primarily statements where only one side of a topic is present."<sup>58</sup>

"Rather than the presence of specific information, the absence of material pointing out another point of view . . ."<sup>59</sup>

"[A]ny substantial treatment of a religious topic from the viewpoint of an adherent or advocate without presentation of other views."<sup>60</sup>

Consistent replies reveal that sectarian references are defined as those religious references which are not objective or are not presented objectively within the book. An unobjective treatment is seen as advocacy.

A "secular" textbook is permitted to refer to religious events, and even to religious doctrine; but in each case the reference must be of a nature and in a context which eliminates any effect of promoting one religion over another, or of promoting religion over non-religion. Where the religious reference is not clearly called for by the context in which it appears, it must be balanced by references of equal emphasis to opposing beliefs or practices held by other religions or by the non-religious. Where the reference is justified by the context of the material being presented, compensating references may not be necessary, but the reference must be factual and in no greater or less detail than called for by the context. If the religious references appear in literary, artistic or musical works, the textbook will qualify as non-sectarian where the selections with religious themes, because of their power as art, do not have a primarily religious effect.<sup>61</sup>

57. Paradoxically, an overly high emphasis on the imprimatur and nihil obstat may result in the acceptance of books which should be rejected. Believing that the frontispiece notation is itself the sectarian element of the textbook, many reviewers will approve an otherwise unaltered text conditioned only on removal of the notation. (Telephone interview with Mr. Sam Musso, Coordinator of Title Grants, Rochester Catholic Schools, February 14, 1969; Interview with Dr. Leo Steinlein, Assistant Superintendent of Instruction, New York Public Schools, in New York City, December 5, 1968.) If the content of a book is sectarian, removal of the imprimatur will not cure it; and if the content is non-sectarian, it should be approved despite the imprimatur.

58. Reply to Herricks, N.Y., questionnaire.

59. Reply to Oneida, N.Y., questionnaire.

60. Reply to Glen Cove, N.Y., questionnaire.

61. The Rochester English Area Consultant replied that great works are objective because: "Good literature [even on religious themes] emphasizes ambiguities inherent in

It is immediately apparent that decisions concerning advocacy will be heavily influenced by the personal bias of the reviewer.<sup>62</sup> Furthermore, these distinctions are impossible without the experienced and knowledgeable reviewers which the Court postulated in *Allen*.

As has been asserted in discussions above, the officials charged with responsibility for review under the Textbook Loan Law generally lack the knowledge and expertise needed for determining sectarianism. In order to test this expertise and to discover the relative weight given by reviewers to various arguably sectarian elements in school textbooks, reviewers were asked during our study to indicate whether the presence of certain hypothetical elements in a textbook would render the book sectarian. A summary of reviewer responses to the hypothetical questions follows.

### *The Questionnaire Hypotheticals*

1. Does the presentation of evolution as a theory which is still a matter of much doubt among scientists render a biology textbook sectarian?

Five per cent (2) replied "Yes" on the basis of this characteristic alone; sixteen per cent (7) replied that it would contribute in a sectarian context to a finding of sectarianism ("Partly"); and seventy-nine per cent (34) replied that this characteristic would have no role in finding a textbook sectarian ("No").

Thus, in spite of the fact that most public school biology textbooks<sup>63</sup> present evolution as an accepted factual account, seventy-nine per cent of reviewers would apparently not see objectivity challenged when "much doubt" is added to the account.<sup>64</sup>

man's condition, while a sectarian reader brings you to a specific conclusion." He thus judges that "Donne, *The Canterbury Tales*, and Dante's *Inferno* are nonsectarian. A sectarian work is 'poster-art.'" The Rochester Art Area Consultant added: "A religious painting by Giotto would be acceptable, but one by Norman Rockwell would not."

It should be noted that the practice of rejecting or accepting orders on the basis of their artistic merit imposes a quality review on the details of private education with implications for private schools' academic freedom. See generally *Epperson v. Arkansas*, 393 U.S. 97 (1968); *Keyishian v. Board of Regents of New York*, 385 U.S. 589 (1967); Comment, *Developments in the Law—Academic Freedom*, 81 HARV. L. REV. 1045 (1968).

62. Statements from the Rochester Area Consultants include: "This law maintains and supports poor education. It is support of a state religion." "I am a strong civil libertarian . . . This law is unconstitutional." "If people want a sectarian flavor, what's the difference?"

63. See, e.g., OTTO *et al.*, MODERN BIOLOGY (6th ed. 1965) (Holt, Rinehart & Winston) (the leading high school biology textbook today).

64. SCIENCE AND LIFE, by Sr. Farley and V. Smith (1966) (Holt, Rinehart & Winston), accomplishes this by presenting evolutionary theory as a series of questions, with question mark punctuation.

2. Would a biology textbook be rendered sectarian by the presence of "Cotter, A.C., S.J., *The Encyclical 'Humani Generis' with a Commentary*," and "*Human Evolution—1956: The Present Catholic Attitude toward Evolution*" among "Selected Readings" listed at the end of a chapter on evolution?<sup>65</sup>

Forty-nine per cent (21) of the responding school boards replied "No": this characteristic would not be considered in a finding of sectarianism. The inclusion of these titles on a Selected Reading List does not necessarily make a book sectarian, and might even be required to prevent sectarianism where the list contains references to books of other religions. Were the list heavily weighted with other titles, however, the list would surely be seen as a "statement where only one side of a topic is present." Only twenty-one per cent of the reviewers replied that "this characteristic alone would not render the book sectarian, but in combination with other elements it would contribute to . . . finding it sectarian" ("Partly"); yet whether the facts presented in the hypothetical render a book sectarian must depend on the context in which the hypothetical list appears.

3. Does the inclusion of such stories as "Twenty-One Saints," "Pio Goes to the Vatican," and "Crusaders for God" render an eighth grade reader sectarian?<sup>66</sup>

Thirty-three per cent (14) replied that the presence of such stories is irrelevant to a determination of sectarianism.

4. Does the inclusion of religious songs in a song book render it sectarian?

Seventy-five per cent (32) replied that such songs are irrelevant. The most obvious way for an anthological textbook, such as a reader or songbook, to be sectarian is to have an overrepresentation of stories or songs from one religion. That some of the items in an anthology favor one religion or some religions cannot be irrelevant to determining sectarianism. However, as in the Selected Reading List example, the possibility that compensating contributions from the other sects will be included in the book requires that reviewers know the context in which religious stories or songs are presented. A "Partly" answer would be appropriate for the above two questions.

65. D. BRAUNGART & R. BUDEKE, *BIOLOGY: THE STUDY OF LIVING THINGS* (1963) (Doubleday & Co.).

66. POOLEY *et al.*, *WIDE, WIDE WORLD* (Cathedral ed. 1962) ("With Ecclesiastical Approval," Scott Foresmann Co.).

5. Does an analysis of the 18th Century growth of democracy as rooted in Catholic philosophy render a book sectarian?

For forty-five per cent (19) of the responding reviewers this would not contribute to a finding of sectarianism.

6. Does a representation of the Crusaders as warriors in a noble cause against barbarians render a world history textbook sectarian?

The seventy-four per cent (34) of reviewers who answered "No," apparently seeing this as an objective view,<sup>67</sup> are in disagreement with Justice Douglas who chose this view of the Crusaders as one of his examples of sectarian books.<sup>68</sup>

7. Would a history book be rendered sectarian by a treatment of the Crusades which (according to the Teacher's Edition), through the use of the present tense has pupils project themselves into history as Crusaders?<sup>69</sup>

Seventy-five per cent (33) of the reviewers replied that this is irrelevant to finding sectarianism. But does not a requirement of objectivity mean that the pupils should be "projected into" the role of Saracens and made to see the Crusades from this point of view also?<sup>70</sup>

## II. Procedure

Textbook review may be ineffective for reasons other than inexpert reviewers and the statute's vague substantive standards for permissible

67. "It is an historical fact," commented Mr. W. Kenneth Fulkerson, Rochester History Area Consultant.

68. 392 U.S. at 260-61.

69. H. EIBLING, F. KING, & J. HARLOW, *WORLD BACKGROUND FOR AMERICAN HISTORY* 317-20 (1965) (Laidlaw).

70. Of particular interest in this set of replies is that the remaining 25% (11) did say that this projection gimmick would contribute to sectarianism, and thus assigned review consideration to the teacher's edition instructions on the use of the book. But reviewers are required by the regulations to consider only the content of the single book requested, and may not consider the teacher's edition, other books on the syllabus that might counter the requested book's effect, or the teacher's use of the requested book. In making the Laidlaw Science Series into a "denominational edition," a change in the teacher's edition was made so that the "textbook that is in the student's hands is the same in either school, but the teaching material for the parochial teacher relates certain science phenomena to religious instruction, which would not be done in the public schools." Letter from Robert R. Laidlaw, President of Laidlaw Bros. Publishers, to the Yale Law Journal, February 19, 1969. See *Dickman v. School Dist. No. 620*, 232 Ore. 238, 243, 366 P.2d 533, 536 (1962), in which the court, in holding an Oregon Textbook Loan Law unconstitutional looked to Teachers' Study Guides to determine that the use of the textbooks is "inextricably connected with the teaching of religious concepts." See also *SR. M. RITA & SR. M. COLMAN, CHANGING EASTERN LANDS* 3 (Teachers' ed. 1963):

Marginal annotations in the text . . . alert the teacher to those principles of Christian social living which the student should be taught to recognize so that he may gradually develop a pattern of thought that is truly Christian.  
(This textbook is approved by Olean, N.Y.)



loans. In spite of the statute's requirement that textbooks be approved by "boards of education, trustees or other school authorities,"<sup>71</sup> many boards delegate or otherwise circumvent this responsibility. A study of Loan Law procedures reveals that some avoidance of review is authorized under other provisions of the Loan Law and regulations, and that some avoidance is the inevitable result of demanding from a bureaucracy a performance of which it is incapable.

*School Lists and Delegation Within the System.* The New York State education system mixes central control under a State Commissioner and Board of Regents, responsible for state-wide policy, funding, and examining, with local control under school boards charged with local policy and administration. Since there is no state-wide list of approved textbooks,<sup>72</sup> each local board regularly approves and purchases its own texts.

Although the titles of most local textbook approvals are not published or circulated, New York City publishes a list four times yearly containing about 25,000 approved textbook titles. A book's appearance on the list indicates eligibility for purchase by the City School District for private school students under the Textbook Loan Law. Requests by private school pupils living in New York City for books not on this official list are referred through channels to a Deputy Assistant Superintendent who arranges for the specialized committee review which is required before a book is added to the approved list.<sup>73</sup>

To enable prompt acquisition of new books pending full review, the City school board has found it necessary to add an Appendix which lists about six thousand titles, each on the recommendation of only one New York City principal or department head. Thus, at least during the interim period when a text is listed in the Appendix, private school pupils can acquire textbooks which have not been reviewed for sectarian content by the officials ordinarily charged with this responsi-

71. 16 N.Y. CONSOL. LAWS § 701(3) (McKinney 1966). The New York Law is unique in permitting private school pupils to order texts not in use in the public schools. Justice Fortas based his dissent in *Allen* on this feature of the law. But in operation the other loan laws may be equivalent to the New York procedure. In Rhode Island, for example, where purchases are limited to texts on the regular state compilation of approved lists, parochial schools can have a particular text added to the public list by informal request to a local school board, which would review the request as in New York. Telephone interview with Mr. Arthur Pontarelli, Office of the State Comm'r of Educ., R.I., Nov. 20, 1968.

72. A state-wide list is said to be too "conservative" since bureaucracy would delay approval of new books for many months; it would also open the state board to sales pressure from publishers. Telephone interview with Mr. Peter Martin, Administrative Ass't for Textbook Selection, N.Y. State Dep't of Educ., Nov. 25, 1963.

73. In separate interviews, the Deputy Superintendent and the Director of the N.Y.S.T.L., Supplies Division disagreed sharply over the number of books that have received this special review; one reported 100 such titles, the other 500.

bility. Even if ultimately rejected by the review committees, the Appendix provides a significant loophole through which sectarian books may infect New York City private schools.

In addition, since some upstate boards use the City list as an alternative to local textbook review procedures,<sup>74</sup> and do not distinguish the Appendix from the permanent City list,<sup>75</sup> temporary appearance on the Appendix could result in permanent approval for purchase upstate.

*Complete Delegation to Outside Interests.* Local reviewers have sometimes circumvented review responsibility entirely by delegating the screening function to interests wholly outside of the school system. For example, Auburn, New York, relates: "If [a book is] approved by [the] diocesan superintendent—we rarely question it."<sup>76</sup> Dunkirk, New York candidly admits that all content review is "delegated to the Diocese of Buffalo."<sup>77</sup> Long Beach reports that a "County-wide organization—public school and private school representatives—does the review."<sup>78</sup> Some boards rely, to varying degrees, on the publishers, another self-interested party, to screen out improper textbook orders. This reliance might indicate either confidence that a "reputable" publisher does not print denominational textbooks,<sup>79</sup> or a dependence on the publisher to refuse to fill a public school's order for a slanted textbook.<sup>80</sup>

While delegation to outsiders, or simple avoidance of review responsibility, is a violation of the statute, the complexity and burdensome nature of the statute's requirements make such shortcuts inevitable.<sup>81</sup> No special funds are provided by the state to cover administrative expenses of the Textbook Law. "The processing of these requests severely challenged the time, energy, and patience of many

74. E.g., Yonkers, Saratoga Spring, Schenectady. Syracuse does no review of its own; it will purchase books approved by any other district in the state.

75. Telephone interview with Mr. Charles Abba, N.Y.S.T.L. Administrator, Schenectady City School Dist., June 3, 1969; telephone interview with Mrs. Ann Scimeca, Office of Coordinator of Business Projects, Yonkers School Dist., June 2, 1969; telephone interview with Mr. John LaRoe, Administrative Assistant, Saratoga Springs School Dist., June 8, 1969.

76. Reply to Auburn, N.Y., questionnaire.

77. Reply to Dunkirk, N.Y., questionnaire. Salamanca, N.Y. also relies on a list provided by the Buffalo Diocese for all textbook review. Telephone interview with Mr. Greer, Business Manager, Salamanca School Dist., June 3, 1969.

78. Long Beach questionnaire.

79. Miss Flora J. Rizzo, Rochester Foreign Language Area Consultant. This confidence is misplaced. Such prominent textbook publishers as Harcourt-Brace & World, Ginn & Co., Laidlaw Bros., and McGraw-Hill publish Catholic and other denominational series.

80. Pelham, New York, for example, encloses a notice with all purchase orders stating that the books are being purchased under the Loan Law, and sectarian editions will not be accepted. However, the hotly competitive publishing industry generally does not want to accept this responsibility. The policy of most companies has been said to be: "When in doubt, ship it out." Telephone interview with Mr. Roger Smith, *Publishers' Weekly*, December 5, 1968.

school officials already burdened with the many demands of school administration."<sup>82</sup> Under these circumstances it cannot be said that the Textbook Law has provided adequate machinery to make the review requirement more than incantatory language in the statute.

*Delegation to Other Boards.* One provision of the Textbook Loan Law—designed to make the law conform to the child-benefit theory<sup>83</sup>—acts to magnify the effects of mistakes in review and of instances of non-review: approval of a textbook by only a single district makes the book available to pupils throughout the state.<sup>84</sup> The fact that the same textbook might have also been rejected for sectarianism by other boards is irrelevant.<sup>85</sup> Therefore, a small school board, understaffed,

81. The procedure commences with the choice of a text, with publisher sales pressure, by the private school officials. In conformity with the "child-benefit" rationale of the Textbook Law, each pupil fills out an individual request form for submission to the district of his residence. On receipt of these requests, the public school authorities must determine that only eligible textbooks are being requested. A textbook is defined as a book which is required as a primary source for one semester or more. GUIDELINES FOR ADMINISTERING THE NEW YORK STATE TEXTBOOK LAW 5, New York State Education Dept., June 28, 1967. If a textbook is among those being used in the public schools, it can be supplied to private pupils from existing stocks. If a text is not on the local public list it must go through the Board's approval channels. Depending on the size of the district, which varies from one million to one thousand children, the approval system employs committees in each subject area, or a few individuals doing book review on an *ad hoc* basis. Once approved, the required number of texts are ordered from the publisher. Before supplying the books to the borrowing pupil, the new texts must be inventoried and labeled as Loan Law purchases. The work involved in the textbook loan orders has been overwhelming, especially because the process of review and ordering has been concentrated in the late Spring of the year before the books are needed. Except in New York City, where four full-time employees are retained for the Loan Law, this is a new duty at the busiest time of the year for officials who generally were fully occupied before.

82. Letter from Joseph F. Fox, Temporary Chairman, Long Island Conference of Religious Elementary and Secondary School Administrators (*Amicus Curiae* supporting Loan Law in *Allen* case), to Superintendent of Schools, Great Neck, N.Y., July 27, 1966.

83. To conform to the child-benefit theory, place of residence determines the district through which an individual child's needs are filled. The provision of the law that pupils are entitled to books approved by any district in the state is designed to assure that entire classes will get texts that are approved for any part of the class in any private school.

84. There has been some confusion about this provision of the statute, due to the State Education Department's initial statements seeming to require each board to make its own determination on sectarianism. GUIDELINES, *supra* note 81, at 1. But the statutory provision is clear in requiring purchase where any district has approved, and only 23% (11) school boards replied on questionnaires that the school board must always make independent decisions on sectarianism. For the remaining boards, approval in another district eliminates the need for local review.

85. Because there is no state-wide list of approvals, information about approvals by other districts can be obtained by the school boards only on a book-by-book basis. The private school requesting the book is likely to make the initial, and perhaps only, inquiry into textbook approvals in other districts. Some Catholic authorities are now maintaining their own Loan Law lists to aid their schools in documenting outside approvals of requested texts. The Buffalo Diocese distributes a thirty-two page list of Loan Law purchases in the diocese—Coded List of Approved Textbooks (revised ed. April, 1968), Dept. of Education, Diocese of Buffalo. This list is on file in the East Aurora, and Niagara Falls public school districts—and also shorter lists noting, for each listed textbook, a school district in which it was approved—List of Textbooks Eligible for Loan Request, Grades Seven and Eight (March 7, 1968), Dept. of Education, Diocese of Buffalo. This list is on file in the Jamestown public school district. Naturally, this list makes no note of a book's rejection by another school board. BERTRAND & SR. VERONICA, *OUR LAND IN A WORLD*

disinterested, incompetent, or politically friendly to private school interests, can have a significant state-wide impact on the purchasing of sectarian books. In addition, the requirement of approval by only a single district makes the system more vulnerable to publisher sales pressure concentrated against particularly lax districts.<sup>80</sup>

Overall, the Textbook Loan Law's review provisions are a failure. The law is complex and burdensome for the thousands of officials responsible for its administration. Its review requirement is shirked or mishandled within many districts. Special provisions of the Law give a state-wide "multiplier effect" to instances of dereliction of textbook review responsibility and review incompetency, while confining the effects of vigilant textbook review to the borders of the vigilant district.

It is not adequate to rely on judicial review to cure the statutory violations. The violations of the review requirement are not likely to be attacked effectively as they occur. The recipients of Catholic-oriented texts are Catholics attending parochial schools, who would not object to a textbook with a Catholic orientation. Furthermore, the expense and burdens of litigation will certainly discourage any but the most determined citizens from initiating court action to bar one or

SETTING (1966), is accurately listed as accepted by Syracuse. There is no mention of the book's rejection by Pelham. Most private authorities have found collation of this information too laborious, and strongly favor a public state-wide cumulation of local lists. Telephone interview with J. Alan Davitt, February 13, 1969.

When a request for a book not in local public school use comes from the private schools unaccompanied by supporting data on outside approvals, the school board will usually seek this information itself, in an effort to eliminate the need for local review.

Aside from publishers, the only other cumulated source of acceptance information available to the public schools is provided by the Board of Cooperative Educational Services (BOCES), a commercial operation to which school boards can contract textbook purchase and supply duties, but not review responsibility. Of the sixty responding school boards, only one (West Irondequoit) indicated that it had a contract with BOCES.

86. It has proven impossible in this study to test empirically the "conduit" theory of increased orders of possibly sectarian books in districts that are delinquent in textbook review. It would be expected that such boards would show an increase in requests for books not on the local public list. But if such increases are present they are being obscured by a much more significant variable—the size of the standing list of books approved for the public schools. In comparing districts with approximately equal numbers of pupils the sizes of the book lists vary enormously, as demonstrated by the following table:

Town	# Pupils, Grades 7-12	# Titles Approved Public Schools 7-12
Plattsburgh	1188	45
Carle Place	1352	277
Peekskill	1375	179
Norwich	1500	75
Glens Falls	1578	68
Oneida	1600	150
Saratoga Springs	1873	52
Canandaigua	1900	215

two sectarian textbooks, and detailed review of secondary school textbooks is hardly an appropriate matter with which to saddle the courts.

Thus, neither the school boards nor the courts are able to enforce the Textbook Loan Law's screening requirements. As in *Freedman v. Maryland*,<sup>87</sup> where a censorship law was held unconstitutional on its face because judicial review procedures were found to be ineffective, the ineffectiveness of school board and judicial review for sectarian textbooks negates Justice White's finding that the New York law provides for textbook review.

### III. Effects

A study of the books approved under the Textbook Loan Law leaves no doubt that sectarian books are being purchased by the public school districts of New York. The sectarian slants in the books chosen as examples<sup>88</sup> are not subtle or sophisticated. Though these books are not representative of all the textbooks approved under the Loan Law, the gross quality of the sectarian distortion in these approved books suggests that many subtly slanted books are being approved despite the required review.<sup>89</sup> Furthermore, under the Textbook Loan Law, the fact that a book discussed below was approved by one school board makes it eligible for loan throughout the state.

Few, if any, subjects are invulnerable to sectarian slants.<sup>90</sup> However, history textbooks contain the most frequent examples of clearly sectarian approvals. *America Yesterday*,<sup>91</sup> an American history up to 1900 by Rev. Philip Furlong, Sr. Margaret, and Donald Sharkey (rev. ed., 1963), is approved for use by five towns.<sup>92</sup> It has no "imprimatur," but is designated on the frontispiece as part of "The Christian Social History Series" of Sadlier publishers. One of the four pictures on the cover shows a Catholic missionary tutoring Indians. The introduction

87. 380 U.S. 51 (1965).

88. These titles were gathered from the approved booklists supplied by approximately 30 of the 240 New York school boards. The text books were read at the Library of Congress and the H.E.W. Educational Materials Center at the Federal City College, Washington, D.C.

89. Examples of more subtly slanted books than those discussed in the text would require lengthy documentation to show the religious character of the presentation in its context.

90. See W. HODGSON, *THE SECULAR* (1850) 4-5. Compare a recent Pennsylvania statute permitting direct aid to the parochial schools for instruction in mathematics, modern languages and physical training, on the grounds that these subjects are strictly secular. PA. STAT. ANN. tit. 24 §§ 5601-09 (Supp. 1969).

91. Cited by Justice Douglas in *Board of Educ. v. Allen*, 392 U.S. 236, 261.

92. Canandaigua, Carle Place, Geneva, Glen Cove, and Gloversville. It was rejected by Glens Falls and N.Y.C.

informs the child: "These pages will also lead you to an appreciation of the part the Church has played in the life of our country."<sup>93</sup> Among the frequent references to the significance of the church, there is the following account of the philosophical precursors of the Declaration of Independence:

Actually, there was nothing new about the ideas expressed in the Declaration of Independence. Most of them are as old as Christianity.

The Catholic Church teaches that all men are created equal because God made all souls in His image and likeness. In God's eyes the soul of the humblest beggar is as valuable as the soul of the millionaire, or of the most powerful government official.

The Church also teaches that everything we have comes from God. This includes the rights of life, liberty, and the pursuit of happiness. Since God gave us these rights no one on earth is justified in taking them away from us. When the Declaration says that "men are endowed by their Creator with certain unalienable rights," it is stating another truth long taught by the Catholic Church.

. . . [A]ll power comes from God, the power of government comes through the people. St. Robert Bellarmine, an Italian Cardinal who died a century and a half before the Declaration of Independence was signed, wrote at length on this subject.

We see then that the ideas expressed in the opening words of the Declaration of Independence were either official teachings of the Church, or had long been held by Catholic scholars. They were not new ideas, but this was the first time they had ever been expressed in such an important government document.

Our Country was off to a good start.<sup>94</sup>

Two of the towns which approved *America Yesterday* replied on their questionnaires that "an analysis of the 18th Century growth of democracy as rooted in Catholic philosophy" would alone render a textbook sectarian.<sup>95</sup> So, in the opinion of at least two of the five approving boards, *America Yesterday* is a sectarian book. This suggests

93. *AMERICA YESTERDAY* at 2.

94. *Id.* at 104. Viewpoints can differ on whether the above excerpt demonstrates that *American Yesterday* is sectarian. Forty-five per cent (17) of the responding reviewers stated that "an analysis of the 18th Century growth of democracy as rooted in Catholic philosophy" does not contribute to a finding of sectarian.

95. One of them, in addition, replied that they would ban any book "printed as a Catholic or any other religious edition."

In the other three boards lenient standards or failure to review might be responsible for these purchases. One of them, for example, replied on its questionnaire that a book claiming Catholic roots for the Constitution's philosophy would not even contribute to a finding of sectarianism—which reflects upon the leniency of their review standards. But this town also replied that "Books really [are] not reviewed . . . [due to] . . . no need as yet."

that some sectarian purchases are due to the approval of unreviewed textbooks.

*America Today*,<sup>96</sup> the companion volume to *America Yesterday* in "The Christian Social History Series," is approved for use by at least four towns.<sup>97</sup> The text contains some discussion of the European events preceding World War II. Sample the following:

Hitler told the German people that he was going to get back the territory which Germany had lost during World War I. He said that the Jews were responsible for Germany's losing the war, as a result they were bitterly persecuted. Protestants and Catholics also suffered at the hands of the Nazis. Of the 20,000 Catholic priests in Germany, more than 14,000 were killed, imprisoned, or banished while Hitler was in power.<sup>98</sup>

*Pope Pius XII Works for Peace.* As in the days before World War I, the Popes worked constantly to prevent war. The Pontiff from 1922-1939 was Pope Pius XI. When he died, the world was heading for war, and everyone wondered who would counsel the world through the troubled days ahead. Cardinal Pacelli was elected and took the name Pius XII. . . . The Pope remained strictly neutral in the war. This did not prevent him from protesting when the rights of neutral nations were violated. He sent messages of sympathy to Poland, Norway, Denmark, Holland, Belgium, and Luxembourg.<sup>99</sup>

American history can also be studied in New York State from *A History of the United States I and II* (1965), for grades seven and eight, by Msgr. E. Goebel, Rev. T. Quigley, and J. O'Loughlin. This text, showing an imprimatur and nihil obstat,<sup>100</sup> is on the approved list in at least four towns.<sup>101</sup> Volume I informs the child about Cortes's conquest:

His mission was not only to conquer the Aztecs' empire, but also to bring Christianity to the people. . . .

It took Cortes about two years to conquer the Aztecs. The details of this conquest make one of the most exciting chapters of history. Cortes and his small band of soldiers sometimes fought—and won—against odds that were almost one thousand to one.

96. D. SHARKEY, SR. MARGARET, REV. P. FURLONG, *AMERICA TODAY* (1964).

97. Canandaigua, Carle Place, Gloversville, and Kingston. It was rejected by Glens Falls, Newburgh, and N.Y.C.

98. *AMERICA TODAY* at 151.

99. *Id.* at 155-56.

100. Listed as a "Catholic School Publication" by Laidlaw Bros. publishers in 1968-69 catalogue at 45.

101. Carle Place, Geneva, Ogdensburg and Plattsburgh. It was rejected by Binghamton, Glen Cove, Irondequoit, and N.Y.C. In two of the accepting towns, had the volumes been reviewed at all, they would have been rejected, because the towns' questionnaire replies indicated that the imprimatur and nihil obstat alone "render a history textbook sectarian."

After the conquest was completed, Cortes rebuilt the ruined Aztec capital and renamed it Mexico City.<sup>102</sup>

Contrast the account of the same events in another text in use in the state:

With the aid of well-trained warriors, the Aztec emperor ruled over many tribes living in central Mexico. Before Spanish explorers conquered Tenochtitlan and took over the Aztec lands in the early 1500's, these Indians were a wealthy, proud people, successfully governing an extensive empire.

But Cortes treacherously seized Montezuma, the Aztec ruler, and made him a prisoner. Later the Aztecs revolted and drove the Spaniards from their capital . . . . With reinforcements, Cortes reconquered the Aztec capital in 1521. In the name of Spain he took control of the Aztec empire. Cortes forced the Aztecs to hand over their rich ornaments of gold, silver, and copper.<sup>103</sup>

Volume II of *A History of the United States*, by Goebel *et al.*, endeavors to teach some comparative government:

The State exists for one purpose; the good of the people. This was made clear by Pope Pius XII in his encyclical *Summi Pontificatus* (On the Function of the State in the Modern World) . . . .<sup>104</sup>

Seven towns<sup>105</sup> approve the use of *World History for a Better World*.<sup>106</sup> This lay-authored textbook carries no designation as a denominational edition. It places heavy emphasis on the history and beliefs of the Christian faith, while devoting little attention to the development of other religions. Its religious bias is exemplified by its summary treatment of Franco's victory in the Spanish Civil War:

Franco established a dictatorship, with a one-party government, the Falange. He restored the Catholic Church to its former position. Thus Jesuits again received the property which they had lost, and once more religious instruction was permitted in the schools and universities.<sup>107</sup>

Two geography books in use in New York State provide some of the

102. 1 HISTORY OF THE UNITED STATES at 64.

103. R. BROWN, A. HELGESON, G. LOBDELL, JR., THE UNITED STATES OF AMERICA: A HISTORY FOR YOUNG CITIZENS 24, 43 (1963) (grade 8).

104. 2 HISTORY OF THE UNITED STATES at 294-95. Another reference to government in this text is: "Also, the Church teaches that no liberty is unlimited, as the anarchist would have people believe. Authority is necessary. This was made clear by Pope John XXIII in his encyclical *Pacem in Terris* (Peace on Earth)."

105. Buffalo, Carle Place, East Aurora, Glen Cove, Glens Falls, Long Beach and Syracuse.

106. By W. Neff & M. Planer (1953). It has been rejected by Binghamton and Hericks.

107. WORLD HISTORY FOR A BETTER WORLD at 653.



most obvious sectarian material. The town of Olean has approved the purchase of *Changing Eastern Lands*, by Sr. Mary Rita and Sr. Mary Colman (1963). Published by Doubleday's Catholic Textbook Division, it sports an imprimatur and nihil obstat.<sup>108</sup> The introduction to the teacher's edition explains: "The geographic material in this text avows the principles of Christian social living and guides the student toward an appreciation of them. . . . It is to be noted that these principles are implicit rather than explicit in text."<sup>109</sup> In conformity with this goal, a typical section of the text is:

In spite of the splendid work of missionaries and the progress of the Catholic Church in Africa, only about thirteen out of every hundred Africans have heard the Ten Commandments. Government for the good of the people and the development of the nation is possible only with able, responsible leaders and educated, watchful voters.<sup>110</sup>

This quote is either a sectarian reference or a grievous *non sequitur*.

In spite of having replied that books with imprimaturs are sectarian, Glen Cove has approved Silver Burdett Publishers' denominational "Earth and Human Family Geography Series," particularly the volume in Southern Hemisphere culture and geography—*Living in Southern Lands*, by J. Donnelly and Rev. J. Ewing (1962).<sup>111</sup> Glen Cove's questionnaire reply that a cross or saint on the frontispiece would render a book sectarian is also not consistent with approval of this text, in view of the full page drawing of Christ in the Andes, opposite the frontispiece. Observe *Living in Southern Lands*' approach to illiteracy:

In many cases, illiteracy and lack of education help to bring about what we call *religious illiteracy*; that is, an inadequate understanding of religion and the law of God. . . . But most damaging to the religious literacy of Latin Americans is the severe shortage of priests, Sisters, Brothers, and lay teachers of religion. There are far fewer priests for the Catholics of Latin America than for any other major area of the world. In Anglo-America, there is one priest for 700 Catholics; in Europe, one for 800; in Asia, one for 1,400; in Africa, one for 1,500. But in Latin America, there is one for 5,000!<sup>112</sup>

108. Olean's approval in spite of its questionnaire reply that the imprimatur in a history or mechanical drawing text would be fatal is further evidence that some books are not reviewed at all. Private school requests for this text have been rejected by Binghamton, Liverpool, and Rochester.

109. *CHANGING EASTERN LANDS* (teachers' ed.) at 3-4.

110. *CHANGING EASTERN LANDS* at 109.

111. This book was rejected by New York City.

112. *LIVING IN SOUTHERN LANDS* at 15.

Even grammar books are vulnerable to sectarian treatment. The clerically authored *English Arts and Skills*<sup>113</sup> is approved by four towns.<sup>114</sup> The grade nine volume, for example, offers the following among ten capitalization exercises in its "Mastery Tests":

4. village, fairfield township, country, saint paul
5. labor, labor day, good friday, birthday
6. secretary, governor brown, senator kennedy [both Catholics], mayor
7. sister, brother albert, father, saint agnes . . .
9. cathedral, saint, saint patrick's cathedral, church
10. college, villanova college, university, jefferson high school<sup>115</sup>

The grade ten volume offers this capitalization exercise:

Capitalize all words referring to the Deity, the Holy Family, and to the Bible.

God	the Virgin Mary	the Bible
the Father	the Holy Ghost	the Almighty
the Son	the Gospel	the Lord <sup>116</sup>

Macmillan's *Pageant of Literature Series*,<sup>117</sup> approved by Spring Valley, was prepared by some of *Arts and Skills*' authors. It is a group of paperbound English and American literature readers in which "[p]ains have been taken to draw attention to the points at which Catholic and literary interests coincide: the pre-Elizabethan period; Newman and the Catholic revival; modern writers such as Belloc, Chesterton, etc."<sup>118</sup> Conforming to this aim, editor J. Brown, S.J., wrote the following note before the "non-fiction story" *Father Damier at Work*:

The only explanation of courage like Father Damier's is of a supernatural nature. Only the love of God, and of fellow-man for the sake of God, can explain such heroism.<sup>119</sup>

In summary, lenient standards and a failure to exercise review have resulted in some blatantly sectarian texts being approved for purchase

113. By Br. H. Albert, Sr. Cornelius Julie, Sr. Francis Camilla, Sr. Mary Agnes, Rev. W.T. McNiff, Rev. W.J. Power, Sr. St. Agnes, Sr. M. Sylvia (rev. ed. 1965).

114. Carle Place, Eastchester, Herricks, and Rockville Centre.

115. *ENGLISH ARTS AND SKILLS* at 251.

116. *Id.* at 393 (grade 10 vol.). *Contrast* D. CONLIN, G. HERMAN, JR. MARTIN, *OUR LANGUAGE TODAY* 7, 352 (1966) (in widespread New York use): "Names referring to a Supreme Being are capitalized: Jehovah, Allah, Christ, Messiah." (In both books these were the only exercises on capitalizing religious terms.)

117. Edited by Rev. W. McNiff, Br. J. Browne, Sr. Francis Camilla, Sr. M. Judine, Sr. M. Gratia (1961) (rejected by Rockville Centre).

118. *Teacher's Guide to PAGEANT OF LITERATURE* (grade 11 vol.), "To the Teacher" at 1.

119. *A BOOK OF NON FICTION* 136 (J. Brown, S.J., ed.).

under the New York Textbook Loan Law.<sup>120</sup> It is impossible to determine the full extent of sectarian purchases. Certainly only a small percentage of available textbooks are of the kind excerpted here. However, as indicated above, depending on how wide the definition of religion is to extend, a much larger percentage of texts contain some sectarian bias. It is hardly necessary to add that parochial school requests are, predictably, concentrated toward Catholic-oriented books.<sup>121</sup> If the "de minimis" doctrine has any application in this area,<sup>122</sup> the extent of systematic sectarian purchases, now and in the future, is wide enough to escape its ambit.

#### IV. Conclusion

*Board of Education v. Allen* has been hailed as a milestone case for the "purpose and effect" test which can fashion "solutions which serve

120. Each approval, it should be remembered, makes the book available statewide. See pp. 129-30 *supra*.

121. Twenty-eight replying school districts yielded an average rate of rejection of 2.2% for requests not previously on the public school lists. The median rate of rejection of extra list requests was 0.1% due to the large number of districts which have never rejected a request.

Some interviewers believe that the problem will increase in New York in the next several years because of the peculiar operation of the Loan Law. At the initiation of the loan program the private schools generally did not maintain textbooks for their pupils (as stated by Justice White, 392 U.S. at 244, n.6). During the first years of the Loan Law the private schools were engaged in textbook stockpiling, so that the schools' needs in textbooks often exceeded the \$15.00 per student state allotment. While the private school needs more books than will be supplied by the State, those requested from the State are those with the least controversial content. Now that three years of loans have elapsed, the private school needs are declining below the state allotment. The Loan Law recognizes this process by providing, in Section 6, for a reduction to \$10.00 per pupil as of Sept. 1969. Even considering this reduction, the situation of the Loan Law fulfilling the entire private needs will be becoming widespread in the next several years. When all needs are met by public funds, the private schools will no longer be distinguishing among books to be requested from public authorities and those to be bought independently. Requests to public authorities for sectarian books will increase accordingly. Dr. Nellie Love, Rochester Educational Communications Area Consultant. Telephone interview with J. Alan Davitt, February 13, 1969, on matter of exhaustion of allotments.

122. Further, it is no defense to urge that the religious practices here may be relatively minor encroachments of the First Amendment. The breach of neutrality that is today a trickling stream may all too soon become a raging torrent and, in the words of Madison, "it is proper to take alarm at the first experiment on our liberties."

*Abington School Dist. v. Schempp*, 374 U.S. 203, 225 (1963).

However, to find the Law unconstitutional on its face the Court requires a showing of a "primary" religious effect. Neither *Allen* nor *Schempp*, the inventor of this Establishment test, discusses the meaning of "primary" in this context. But since the "de minimis" doctrine is not applicable in this area, a "primary" effect is probably a "principal" effect, as contrasted to an "incidental" effect. The supplying of religious textbooks by public authorities would be a "principal" religious effect of the operation of the Textbook Loan Law. An example of an "indirect" religious effect, not banned by the Establishment clause, is the Sunday Closing Laws, which have the permissible "direct" effect "to set aside a day of rest and recreation." Only incidentally do the "Blue Laws" aid religion. *McGowen v. Maryland*, 366 U.S. 420, 449-50 (1961).

broad constitutional purposes while meeting specific contemporary needs.”<sup>123</sup> But the Court never completely applied its “effect” test in *Allen*. Though the test adopted was a pragmatic one necessitating a finding of fact, the opinion dealt only in abstractions. It was assumed that the administrators of the law would properly define permissible and impermissible state aid, and guard effectively against the latter. The Court was wrong.

Sectarian textbooks are being purchased under the New York Textbook Loan Law. This is true not only because certain officials fail to abide by constitutional standards from time to time. Rather, it is true because the statute and its regulations fail to provide rational standards for review, assign the review responsibility to incompetent officials, and use procedures which often allow for the purchase of unreviewed textbooks. A statute which calls for textbook review by public school officials without making adequate provisions for the effective administration of this mandate does not really provide for review.<sup>124</sup> Without effective review, sectarian books will inevitably be supplied under the Textbook Loan Law. If, as the Court implied, a state law which supplies sectarian books to private school pupils has a “primary effect” of establishing religion, then the Textbook Loan Law is unconstitutional under the Court’s opinion. Had the Court remanded for trial on the issue of “effect,” rather than affirming a summary judgment, the issue would have been faced squarely.

Furthermore, the survey of New York reviewers and the state court decisions attempting to classify various uses of the Bible suggest that the Court’s “effects” test for permissible and impermissible state aid is incapable of consistent, rational application. Had the Court insisted upon clear and workable standards, it would have been driven either to abandon the “effects” test or to hold that no aid to parochial education is permissible.<sup>125</sup> Avoiding the task of defining standards enabled the Court to allow aid while maintaining the tests developed in previous Establishment Clause cases.

Even if the Court believed its “effects” test a viable one, its assumption that the review provision of the New York law would operate effectively reflects an ingenuousness unsuitable to decision-making in areas of vital constitutional protections. By failing to provide workable standards, the Court delegated formulating and applying standards to

123. Valente, *supra* note 13, at 585.

124. Cf. *Freedman v. Maryland*, 380 U.S. 51 (1965).

125. But see Freund, *Comment: Public Aid to Parochial Schools*, 82 HARV. L. REV. 1680, 1691 (1969).

local administrators. But such difficult decisions as whether a textbook has the effect of advancing religion require a thoroughgoing factual investigation and intimate knowledge of secular and religious subjects, capacities not ordinarily found in lower-level bureaucrats such as the New York textbook reviewers. The Court has been skeptical of the ability of police departments to enforce the protection of the fifth and sixth amendments without clear, detailed guidelines;<sup>120</sup> the Court should be equally skeptical of the ability of any large bureaucracy to follow complex, little understood distinctions in the first amendment area.

APPENDIX

REVIEWER QUESTIONNAIRE WITH TABULATED RESULTS

*How Does Your District Decide What Is a "Sectarian" Book?* (To be completed by official responsible for NYSTL textbook review, or, if wholly delegated, by the individual or committee-member making such decisions.)

	Yes*Partly*No*		
a. Does an Imprimatur or "Nihil Obstat" render a history textbook sectarian?	29	12	5
b. Does an Imprimatur or "Nihil Obstat" render a mechanical drawing textbook sectarian?	29	3	13
c. Does the statement "With Ecclesiastical Approval" render a textbook sectarian?	15	15	16
d. Does authorship by a clergyman render a textbook sectarian?	0	6	41
e. Does the failure to discuss evolution render a basic science book sectarian?	1	4	39
f. 1) Does a discussion of evolution as related to the Book of Genesis render a biology textbook sectarian?	5	4	22
2) If it contains a passage such as follows: "Augustine interpreted this [Biblical] passage to mean that God gave to the earth the power to bring forth living things in time. Augustine's explanation of the origin of living things sounds much like modern evolutionary theory."?	5	15	22
g. Does the presentation of evolution as a theory which is still a matter of much doubt among scientists render a biology textbook sectarian?	2	7	34

126. *Miranda v. Arizona*, 384 U.S. 436, 444-45 (1966).

- |   |    |    |    |
|---|----|----|----|
| h. Would a biology book be rendered sectarian by the presence of "Cotter, A.C., S.J., <i>The Encyclical 'Humani Generis' with a Commentary</i> ," and "Human Evolution—1956: The Present Catholic Attitude toward Evolution" among "Selected Readings" listed at the end of a chapter on evolution? | 13 | 9  | 21 |
| i. Would a biology textbook be rendered sectarian by repeated reference to the Augustinian monk, Gregor Mendel, who formulated Mendel's Laws, as "Father Mendel," while other historical figures are not given their titles more than once?   | 3  | 15 | 25 |
| j. Does the inclusion of such stories as "Twenty-One Saints," "Pio Goes to the Vatican," and "Crusaders for God" render an eighth grade reader sectarian?   | 14 | 15 | 14 |
| If about 10% of the reader's titles are of similar character?   | 10 | 13 | 11 |
| 5%  | 8  | 9  | 15 |
| 20%   | 17 | 10 | 6  |
| k. Does the inclusion of religious songs in a song book render it sectarian?  | 2  | 9  | 32 |
| l. Would a history book be rendered sectarian by a treatment of the Crusades which (according to the Teacher's Edition), through the use of the present tense has pupils project themselves into history as Crusaders.  | 2  | 9  | 33 |
| If, in the book, the Pope speaks to the "Crusaders" and they respond "It is the will of God! It is the will of God!" [to march on Jerusalem]?   | 1  | 7  | 32 |
| m. Does a representation of the Crusaders as warriors in a noble cause against barbarians render a world history textbook sectarian?  | 2  | 10 | 34 |
| n. Does the use of the terms "Protestant Rebellion," and "Church Reform," instead of "Reformation," and "Counter-Reformation" render a textbook sectarian?  | 2  | 10 | 33 |
| o. Does an analysis of the 18th Century growth of democracy as rooted in Catholic philosophy render a book sectarian?   | 11 | 12 | 19 |
| p. Does a picture of a cross on the spine or cover or frontispiece of a textbook render it sectarian?   | 20 | 18 | 6  |
| q. Does a picture of a saint on the cover or frontispiece render a textbook sectarian?  | 19 | 19 | 6  |
| r. Could you please discuss other characteristics which would lead you to judge a textbook to   |    |    |    |

be "sectarian" and therefore not purchasable under the Loan Law. (use attached pages if necessary)

- s. Could you please discuss any controversies which have arisen over approval or rejection of books by your Board for "sectarian" content. (use attached pages if necessary)

\*Please mark "YES" if the characteristic described renders the textbook sectarian for the purposes of the Textbook Loan Law regardless of any other characteristics of the book.

Mark "PARTLY" if this characteristic alone would not render the book sectarian, but in combination with other elements it would contribute to your finding it sectarian.

Mark "NO" if the characteristic alone or in combination with other factors would not render the book sectarian.